(1)

Supreme Court, U.S.
FILED

05-10 MAY 20 2005

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

AirTrans, Inc.,

Petitioner

v.

Kenneth M. Mead, The Inspector General,
United States Department of Transportation, Et.Al.

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Anthony J. McMahon
6106 MacArthur Boulevard
Suite 110
Bethesda, MD 20816
(301) 263-0588
Counsel for Petitioner

AMERICAN FINANCIAL PRINTERS • (202) 464-5500

QUESTION PRESENTED

AirTrans, Inc. is a trucking company that transported goods in interstate commerce. The question presented is whether the Inspector General of the United States Department of Transportation has authority to obtain and execute a search warrant to investigate compliance with regulations of the Federal Motor Carrier Safety Administration, an operational administration within the Department of Transportation.

PARTIES TO THE PROCEEDINGS

The petitioner is AirTrans, Inc. Petitioner has neither parent companies nor nonwholly owned subsidiaries.

The respondents are Kenneth Mead, individually and in his capacity as Inspector General, U.S. Department of Transportation; Joseph Zschiesche, Special Agent, Office of Inspector General; Jeff Holt, Dyer County Sheriff; Larry Bell, Captain, Dyer County Sheriff's Department; Dyer County, Tennessee; Samsung International, Inc.; U.S. Logistics Inc.; and Christopher Ashworth, Esq.

TABLE OF CONTENTS

Page

Question Presented i

Parties ii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Statutes Involved 1

Statement of the Case 5

Reasons for Granting the Writ 6

I. There is a Conflict Among the Circuits Regarding the Authority Conferred by the IG Act. The Sixth Circuit Decided that Section 228 Confirmed the IG's Authority to Conduct Certain Investigations; The DC Circuit Held that it Did Not 6

A. Conflict With The D.C. Circuit 8

B. The Decision Conflicts Also With A Decision of The Court of Appeals For The Fifth Circuit 10

II. The Question is Important; The IG's *Ultra Vires* Investigations Are Continuing 12

Conclusion 12

TABLE OF AUTHORITIES

Page(s)

CASES:

Burlington Northern RR Co. v. Office of Inspector General, Railroad Retirement Board, 983 F.2d 631 (5th Cir. 1993) 10, 11, 13

In the Matter of the Search of Northland Trucking Inc. (D.C. Arizona) 7, 8

Truckers United For Safety, et al., v. Kenneth Mead, The Inspector General, Department of Transportation, 251 F.3d 183 (D.C. Cir. 2001) 8, 12, 13

STATUTES:

Equal Access to Justice Act, 28 U.S.C. § 2412(d) 9

The Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978), 5 U.S.C. App. 3 ..... 1, 6

The Motor Carrier Safety Improvement Act of 1999, Pub. L. No.106-159, 113 Stat. 1748, 1773 (1999) ("MCSIA") 3, 4, 6, 9, 11, 12

49 U.S.C. Chapter 5 4

OTHER AUTHORITIES:

Fed. R. Civ. P. 12(b)(6) 6

145 Cong Rec H 12874 (Nov. 18, 1999) 7

13 U.S. Op. Off. Legal Counsel 54, 66 11

OPINIONS BELOW

The November 18, 2004 opinion of the court of appeals, which is reported at 389 F.3d 594 (6th Cir. 2004), is set out at pp. A3-A13 of the Appendix to this petition. The February 22, 2005 order of the court of appeals denying a petition for rehearing en banc is set out at pp. A1-A2 of the Appendix. The October 29, 2002 order of the district court granting the federal defendants' motion to dismiss, which is not reported, is set out at pp. A14-A26 of the Appendix.

JURISDICTION

The court of appeals entered its opinion and order on November 18, 2004. The order of the court of appeals denying rehearing was entered February 22, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978), 5 U.S.C. App. 3 (the IG Act) reads, in pertinent parts, as follows:

> Sec. 2. Purpose and establishment of Offices of Inspector General; departments and agencies involved –
> In order to create independent and objective units –
> (1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments listed in section 11(2);
> (2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect

fraud and abuse in, such programs and operations; and

(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action; there is established – (A) in each of such establishments an office of Inspector General, ...

Sec. 3(a). There shall be at the head of each Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity .... Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment. Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.

(b) An Inspector General may be removed from office by the President. The President shall communicate the reasons for any such removal to both Houses of Congress.

Sec. 4(a). It shall be the duty and responsibility of each Inspector General, with respect to the establishment within which his Office is established–

(1) to provide policy direction for and to conduct, supervise, and coordinate audits and investigations

relating to the programs and operations of such establishment; ...
(5) to keep the head of such establishment and the Congress fully and currently informed, ... concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment, to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action. ...

Sec. 9. Transfer of functions
(a) There shall be transferred – ...
(2) to the Office of the Inspector General, such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act, except that there shall not be transferred to an Inspector General under paragraph (2) program operating responsibilities.

The Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748, 1773 (1999) ("MCSIA") reads in pertinent part as follows:

Sec. 101. ESTABLISHMENT OF FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION.

(a) In General. – Chapter 1 of title 49, United States Code, is amended by adding at the end the following:

"§ 113. Federal Motor Carrier Safety Administration

"(a) In General. – The Federal Motor Carrier Safety Administration shall be an administration of the Department of Transportation. …

"(f) Powers and Duties. – The Administrator shall carry out – "(1) duties and powers related to motor carriers or motor carrier safety vested in the Secretary by chapters 5, …

"(g) Limitation on Transfer of Powers and Duties. – A duty or power specified in subsection (f)(1) may only be transferred to another part of the Department when specifically provided by law.

Sec. 228. DOT AUTHORITY.

(a) IN GENERAL.- The statutory authority of the Inspector General of the Department of Transportation includes authority to conduct, pursuant to Federal criminal statutes, investigations of allegations that a person or entity has engaged in fraudulent or other criminal activities relating to the programs and operations of the Department or its operating administrations.

(b) REGULATED ENTITIES.- The authority to conduct investigations referred to in subsection (a) extends to any person or entity subject to the laws and regulations of the Department or its operating administrations, whether or not they are recipients of funds from the Department or its operating administrations.

Chapter 5 of 49 U.S.C., referred to in § 113(f)(1) of Section 101 of the MCSIA includes:

§ 502. General authority

(a) The Secretary of Transportation shall carry out this chapter.

(b) The Secretary may –

(1) inquire into and report on the management of the business of rail carriers and motor carriers; …

(3) obtain from those carriers and persons information the Secretary determines to be necessary.

…

(d) The Secretary may subpoena witnesses and records related to a proceeding or investigation under this chapter … .

§ 504. Reports and records

(a) In this section –

…

(2) "carrier" means a motor carrier, motor carrier of migrant workers, motor private carrier, and rail carrier. …

(c) The Secretary, or an employee designated by the Secretary, may on demand and display of proper credentials –

(1) inspect the equipment of a carrier or lessor; and

(2) inspect and copy any record of –

(A) a carrier, … .

§ 506. Authority to investigate

(a) The Secretary of Transportation may begin an investigation under this chapter on the initiative of the Secretary or on complaint. If the Secretary finds that a [carrier] is violating this chapter, the Secretary shall take appropriate action to compel compliance with this chapter.

STATEMENT OF THE CASE

On August 17, 2001, agents of the Inspector General of the Department of Transportation (IG), Federal Bureau of Investigation, and the Dyer County, Tennessee Sheriff's

Department, executed a federal search warrant on AirTrans' premises. The warrant was issued to Joseph M. Zschiesche, an agent of the IG. The IG seized AirTrans' property. The property has not been returned.

The district court dismissed AirTrans' complaint under Fed. R. Civ. P. 12(b)(6), holding that section 228 of the MCSIA created new authority in the IG to investigate alleged violations of regulations administered by the Federal Motor Carrier Safety Administration (FMCSA). In doing so, however, the court made this acknowledgement: "This court recognizes that this grant of power is somewhat inconsistent with the general prohibition on Inspector General participation in the regular operations of the USDOT." (App. p. A-23)

REASONS FOR GRANTING THE WRIT

The court of appeals did not adopt the conclusion of the district court that section 228 of the MCSIA created new authority. Rather, the court below held that section 228 clarified that the IG had the authority exercised in the investigation of AirTrans from the enactment of the Inspector General Act (IG Act).

I. There is Conflict Among the Circuits Concerning the Investigatory Power Conferred by the IG Act. The Sixth Circuit Decided that Section 228 Confirmed the IG's Authority to Conduct Certain Investigations; The D.C. Circuit Held that it Did Not.

The circuit court's conclusion that the authority to conduct the investigation of AirTrans existed before the enactment of section 228 is evident in its opinion:

> Although there may have been some dispute between the DOT's OIG and various trucking companies concerning the scope of the Inspector General's investigative authority prior to the 1999 Act, there can no longer be any question, given the plain language of § 228.

389 F.3d at 600.

After the word "Act" the circuit court dropped a footnote that reads:

> The joint explanatory statement of H.R. 3419: Motor Carrier Safety Improvement Act of 1999 by Rep. Bud Shuster, Rep. James Oberstar, Rep. Thomas Petri, Rep. Nick Rahall, Sen. John McCain and Sen. Ernest Hollings stated:
>
> This section clarifies Congressional intent with respect to the criminal investigative authority of the Department of Transportation Inspector General (IG). ... Recently, a U.S. District Court concluded that an investigation undertaken by the IG exceeded its jurisdiction, see In the Matter of the Search of Northland Trucking Inc. (D.C. Arizona) [sic], finding that the motor carrier involved was not a grantee or contractor of the Department, nor was there evidence of collusion with DOT employees. This *narrow construction of the IG's authority is not well grounded in law,* and the managers are concerned about the adverse impacts the Order could have on IG operations. *This provision, therefore, clarifies Congressional intent with respect to the authority of the IG, reaffirming the IG's ability and authority to continue to conduct criminal investigations of parties subject to DOT laws or regulations*, whether or not such parties receive Federal funds from the

> Department. 145 Cong Rec H 12874 (Nov. 18, 1999) (emphasis added [by the court]).

389 F.3d 594, 600, fn 4.

Thus, the court concluded that the congressional intent in enacting the Inspector General Act included the authority to conduct the investigation that was challenged by AirTrans.

A. CONFLICT WITH THE D.C. CIRCUIT.

That conclusion conflicts directly with an earlier decision of the Court of Appeals for the D.C. Circuit on the authority of the DOT IG and the significance of section 228. In *Truckers United For Safety, et al., v. Kenneth Mead, The Inspector General, Department of Transportation*, 251 F.3d 183 (D.C. Cir. 2001), a trade group, Truckers United For Safety (TUFS) and five trucking companies on which the IG had executed search warrants, challenged the IG's authority.

It is noteworthy that one of the five trucking company plaintiffs in *TUFS* was Northland Trucking, Inc., the company mentioned in the congressional managers' floor colloquy relied on by the court in *AirTrans* for interpretation of the IG Act as illuminated by section 228. The *Northland* order complained of by the floor managers, declaring the search illegal, was entered September 22, 1999. The decision in *TUFS* that dealt with the same search and ordered the seized property to be returned, was entered June 5, 2001. It said in part:

> In keeping with its mission to enforce motor carrier safety regulations, the Office of Motor Carriers ("OMC") initiated compliance review investigations into appellants' record keeping practices. As part of that effort, the Department of Transportation's Office of Inspector General ("DOT

> IG") was engaged to use its purported search and seizure authority to obtain appellants' business records. Under the legal framework in effect at the time of the underlying events, the Inspector General Act of 1978 ... the Inspector General ("IG") had no authority to engage in the kinds of criminal investigations at issue here – criminal investigations that are at the heart of an agency's general compliance enforcement responsibilities. We therefore hold that appellants are entitled to the return of records and other property seized from them during the IG's *ultra vires* investigations and seizures.

251 F.3d at 185.

Commenting on section 228 of the MCSIA the D.C. Circuit said, "[T]he district court correctly rejected the IG's argument that the 1999 law merely clarified that his office always possessed the authority to conduct such investigations." Continuing, the court noted the IG's argument that even though the MCSIA did not directly govern pre-1999 investigations, it provided evidence that, even before the MCSIA was enacted, the IG had authority to investigate the trucking companies. To substantiate this position, the IG pointed to the floor managers' comments that *clarified and reaffirmed* the IG's Pre-MCSIA authority that persuaded the Sixth Circuit. The D.C. Circuit said, "This sparse piece of legislative history cannot carry the day for the IG." (251 F.3d at 190)

After the D.C. Circuit decision, the district court ordered an award of attorney fees of $115,682.24 to the TUFS plaintiffs under the Equal Access to Justice Act, ("EAJA") 28 U.S.C. § 2412(d), holding that the IG was not "substantially justified" in investigating the trucking companies. The D.C. Circuit ordered the amount reduced to

conform with the limits in the EAJA. The parties agreed to an amount of about $70,000.

B. THE DECISION CONFLICTS ALSO WITH A DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

In *Burlington Northern RR Co. v. Office of Inspector General, Railroad Retirement Board*, 983 F.2d 631 (5th Cir. 1993), the Inspector General of the Board disapproved of the Board's performance of its investigatory functions and decided to perform them himself. He issued a subpoena to a railroad that a district court refused to enforce, concluding that it was in aid of an *ultra vires* regulatory audit. The circuit court affirmed, saying in part:

> Today we recognize an additional, narrow limit on the Inspector General's broad investigatory and subpoena powers. In particular, we hold that an Inspector General lacks statutory authority to conduct ... regulatory compliance investigations or audits ... we mean those investigations or audits which are most appropriately viewed as being within the authority of the agency itself. Thus, as a general rule, when a regulatory statute makes a federal agency responsible for ensuring compliance with its provisions, the Inspector General of that agency will lack the authority to make investigations or conduct audits which are designed to carry out that function directly.

983 F.2d at 642.

In *AirTrans*, the court noted that the IG agent obtained a search warrant by claiming:

> that drivers at AirTrans made false statements in an attempt to cover-up violations of federal safety

> regulations. Coinciding with [the agent's] claims, the magistrate judge issued a warrant for the seizure of relevant documents, including "[d]river qualification files and [] personnel files," "driver logs" and "[a]ny and all records relating to ICC or DOT numbers and of applications for such numbers.

389 F.3d 594, 600.

Section 113 of MCSIA, set out above, makes such a regulatory compliance investigation the responsibility of the Federal Motor Carrier Safety Administration.

In *Burlington Northern*, the court cited an opinion of the Justice Department's Office of Legal Counsel (OLC) on the investigative authority conferred by the IG Act. The opinion, 13 U.S. Op. Off. Legal Counsel 54, March 9, 1989, arose out of a dispute involving the Inspector General of the Department of Labor, but it expanded into an explication of the authority of Inspectors General of six other departments, including the Inspector General of the Department of Transportation.

The OLC opinion was clear that it was intended to apply to all of the inquiring agencies, and not just to the Department of Labor. The following guidance applied with equal weight to the Department of Transportation.

> Thus, the Inspector General has the authority to review regulatory investigative activities of the Department of Labor, and to report his criticism and findings to the head of the department and Congress. All we conclude here is that the Act does not give the Inspector General the authority to assume these regulatory investigative responsibilities himself.

13 U.S. Op. Off. Legal Counsel 54, 66.

II. The Question is important; The IG's *Ultra Vires* Investigations Are Continuing.

In *Truckers United For Safety* the D.C. Circuit said, "It is possible that, since passage of the MCSIA, the DOT IG has, in practice, properly exercised its authority." 251 F.3d at 191. The *TUFS* decision was issued on June 5, 2001. On August 17, 2001, the IG executed his search warrant on AirTrans. These incursions are violent, terrifying, and dangerous to people on the premises. The investigators enter by force, wearing body armor, brandishing automatic weapons, and screaming at people who are quietly at work.

More recently, the IG began a regulatory compliance investigation of one of the country's largest motor carriers. The company apparently is too large for the use of a search warrant to find the desired records. Instead, in April 2005, an assistant United States Attorney sent a Grand Jury Subpoena that requires the company to turn over records to a Special Agent of the DOT IG. A copy of the cover letter and subpoena are in the Appendix at pp. A27-A32.

Anything that would identify the trucking company has been redacted for its protection. However, this appears to be a Federal Grand Jury Subpoena for records that only could be used to investigate compliance with motor carrier safety regulations administered by the Federal Motor Carrier Safety Administration. The records include the names of drivers, driver managers and dispatchers and all records, such as receipts, that can be used to check entries on the drivers' logs, which also must be produced.

CONCLUSION

The Sixth Circuit was correct in holding that section 228 of the MCSIA did not create new authority but simply reaffirmed the Inspector General's authority under the IG

Act. The court's error lay in finding that the IG's authority included investigation of compliance with regulations of the Department's component units.

The authority set out in the IG Act, as reviewed by the courts in the *Burlington Northern* and *Truckers United For Safety* cases and the opinion of the Office of Legal Counsel, make clear that the IG cannot perform the functions of the Federal Motor Carrier Safety Administration while supervising the agency's performance of those functions. The decision of the Sixth Circuit in the AirTrans case is clearly erroneous.

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Anthony J. McMahon
6106 MacArthur Blvd.
Suite 110
Bethesda, MD 20816
(301) 263-0588
Counsel for Petitioner

02-6411

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[DATE STAMP]

AIRTRANS, INC.,
Plaintiff-Appellant,

v. ORDER

KENNETH MEAD, INSPECTOR GENERAL,
U.S. DEPARTMENT OF TRANSPORTATION, ET AL.,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Intervenor,

FOUR UNNAMED AGENTS OF THE TENNESSEE
DEPARTMENT OF TRANSPORTATION, ET AL.,
Defendants.

BEFORE: DAUGHTREY and SUTTON, Circuit Judges;
and JULIAN COOK,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

---

*Hon. Julian A. Cook, Jr., Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 04a0400p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AIRTRANS, INC.,
Plaintiff-Appellant,

v. No. 02-6411

KENNETH MEAD, individually and in his capacity as Inspector General, U.S. Department of Transportation; JOSEPH ZSCHIESCHE, Special Agent, Office of Inspector General; JEFF HOLT, Dyer County Sheriff; LARRY BELL, Captain, Dyer County Sheriff's Department; DYER COUNTY, TENNESSEE; SAMSUNG INTERNATIONAL, INC.; U.S. LOGISTICS INC.; and CHRISTOPHER ASWORTH, ESQ.,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Intervenor,

FOUR UNNAMED AGENTS OF THE TENNESSEE DEPARTMENT OF TRANSPORTATION; JIMMY PORTER, Dyer County Investigator Sheriff's Department,
Defendants.

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 01-02951 – Samuel H. Mays, Jr., District Judge.

Argued: June 15, 2004

Decided and Filed: November 18, 2004

Before: DAUGHTREY and SUTTON, Circuit Judges; COOK, District Judge.*

COUNSEL

ARGUED: Anthony J. McMahon, Bethesda, Maryland, for Appellant. Steve Frank, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., James B. Summers, NEELY, GREEN, FARAGARSON, BROOKE & SUMMERS, Memphis, Tennessee, Edward Medina, KIRBY & McGUINN, San Diego, California, for Appellees. **ON BRIEF**: Anthony J. McMahon, Bethesda, Maryland, for Appellant. Steve Frank, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., James B. Summers, NEELY, GREEN, FARAGARSON, BROOKE & SUMMERS, Memphis, Tennessee, Edward Medina, Dean T. Kirby, Jr., KIRBY & McGUINN, San Diego, California, for Appellees.

OPINION

PER CURIAM. This civil rights action, filed pursuant to 42 U.S.C. § 1983, was initiated by the plaintiff, AirTrans, Inc., a Dyer County (Tennessee) long-distance trucking company, while the company was under investigation by the Office of Inspector General (OIG) of the United States Department of Transportation (DOT) for alleged violations of federal criminal statutes. AirTrans sought damages from and injunctive relief against various state and federal government officials and others, after its offices were subjected to a search and the seizure of company records. The complaint was based on the contention that the agents' action in executing the search

---

*The Honorable Julian A. Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

warrant at the AirTrans offices was in violation of the Fourth Amendment because the DOT's Inspector General lacked authority to obtain and execute a search warrant. The district court dismissed the action against all defendants after finding that the complaint failed to state a claim upon which relief could be granted, principally because the court concluded that the search warrant was authorized under § 228 of the Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat. 1748 (codified at 49 U.S.C. § 101 note and 5 U.S.C. App. § 4 note (2004)). We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 17, 2001, Special Agent Joseph Zschiesche of the DOT's OIG, assisted by FBI agents and deputies from the Dyer County Sheriff's Department, executed a federal search warrant on the premises of plaintiff AirTrans's business offices in Dyersburg, Tennessee. During execution of the warrant, the agents seized records and disabled company computers, leaving AirTrans effectively unable to operate. As a result of the search and the continuing federal investigation, AirTrans allegedly suffered injury to its sales, credit, goodwill, and reputation.

The source of the plaintiff's difficulties with the government was an agreement that AirTrans had reached with defendants Samsung and U.S. Logistics, Inc., under which AirTrans would provide transportation of Samsung's manufactured goods from its factory in Tijuana, Mexico. Ultimately, a dispute broke out among the parties in December 1999, with AirTrans alleging that Samsung and U.S. Logistics had proposed a fraudulent billing scheme that AirTrans refused to adopt. Samsung and U.S. Logistics, on the other hand, contended that AirTrans had charged them for some six or seven times the amount of traffic that AirTrans had actually provided, and they refused to pay the

full amount of the invoices that AirTrans had sold to a factoring agent named Allied. As a result, Christopher Ashworth, an attorney representing Samsung and U.S. Logistics, sent Allied a letter dated May 16, 2000, accusing Allied and AirTrans of criminal conduct and indicating that at the request of his clients, he had sent certain business records to the FBI and requested an investigation.

It is not clear from the record in this case whether or not the DOT's ensuing investigation of AirTrans was precipitated by information sent by Ashworth. What is clear is that the investigation led to criminal litigation involving AirTrans in California and, as part of that investigation, the search of the AirTrans offices in Tennessee. After the search, AirTrans filed a § 1983 action against the defendants seeking compensation for its business losses, an order declaring the search illegal, and an injunction against the government's continuing investigation of AirTrans. Motions to dismiss were filed by Inspector General Kenneth Mead and Special Agent Zschiesche, the federal defendants who authorized and secured the search warrant; by the United States as intervenor; and by Samsung, U.S. Logistics, and Christopher Ashworth, the private defendants who allegedly initiated the investigation of AirTrans. Dyer Sheriff Jeff Holt, Captain Larry Bell, and Dyer County, the state defendants who assisted in executing the warrant, filed a motion for summary judgment. All of the motions were granted and the complaint was dismissed by the district court. AirTrans now appeals the order of dismissal.

DISCUSSION

We review *de novo* a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). "Whether the district court properly dismissed the complaint pursuant to [Rule] 12(b)(6) is a question of law... All factual allegations are deemed admitted, and when an allegation is

capable of more than one inference, it must be construed in the plaintiffs' favor." *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1039-40 (6th Cir. 1991). "A Rule 12(b)(6) motion should only be granted if 'it appears beyond doubt that the plaintiffs can prove no set of facts in support of [their] claim which would entitle [them] to relief.'" *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993) (quoting *Hospital Bldg. Co. v. Trustees of the Rex Hosp.*, 425 U.S. 738,746 (1976)).

We additionally review *de novo* the grant of summary judgment by a district court. See *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Although there are peripheral issues raised on appeal,[1] the dispositive issue on appeal concerns the district

---

[1]For example, AirTrans contended that false statements by attorney Ashworth led to the issuance of the search warrant and invoked 18 U.S.C. § 1001 as a basis for seeking damages against both Ashworth and, on a theory of respondeat superior, his clients, Samsung and U.S. Logistics. But there is no right to bring a private action under that federal criminal statute and, as the district court held in dismissing this claim under applicable California law, the statements were privileged because made in the course of official proceedings, citing California Civil Code § 47(b)(3). On appeal, AirTrans seeks to shift the focus away from Ashworth's statements to law enforcement and onto statements made in letters to Allied, conceding that it "does not believe that any report that Ashworth made to the FBI in San Diego resulted in the investigation in Tennessee," but instead positing that a member of Allied contacted the FBI in Tennessee as a result of Ashworth's letter to Allied, creating a chain of events for which Samsung should be held liable. AirTrans does not make clear under what theory or upon what statutory basis this

court's decision to dismiss the action against the federal defendants on the basis of qualified immunity. AirTrans argues that Agent Zschiesche lacked authority to obtain and execute the search warrant and thereby violated the company's constitutional rights.[2] In support of this contention, the company argues that the district court misinterpreted the Motor Carrier Safety Improvement Act of 1999 (the 1999 Act) in ruling that the federal defendants were entitled to qualified immunity.

As the district court noted, in order to state a claim for violation of its constitutional rights, whether under *Bivens*[3] or 42 U.S.C. § 1983, AirTrans "must identify a right

---

liability should be imposed.

AirTrans also contends that the Dyer County officials who assisted in the search knew that it was illegally obtained and so violated 42 U.S.C. § 1983 by violating AirTrans' constitutional rights under color of state law. The Dyer county defendants maintain that when assisting with the search warrant they were actually "on loan" to the federal government and so were not acting under color of state, but rather federal law. However, the district court did not reach this issue as it was satisfied that the warrant had been obtained legally and so found that AirTrans failed to provide evidence sufficient to raise a genuine issue of material fact showing that its constitutional rights were violated.

[2]AirTrans also attacks the government's motive in pursuing the investigation in the first place, as well as Agent Zschiesche's reason for conducting the search of the AirTrans premises, insisting that the sole purpose of the investigation was to "bring down Freddie Ford," the CEO of the company, in retaliation for his succeeding in having prior federal charges against him dismissed. The most that can be said about this contention is that it was unsubstantiated on the record in this appeal.

[3]*Bivens v. Six Unknown NarnedAgents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) created a federal right of action for money damages for the violation of constitutional rights. The Supreme Court writing through Justice Brennan for the majority, acknowledged that although the Fourth Amendment does not allow an award of money

secured by the United States Constitution and the deprivation of that right by a person acting under color of... law." *Watkins v. City of Southfield,* 221 F.3d 883,887 (6th Cir. 2000) (quoting *Russo v. City of Cincinnati,* 953 F.2d 1036, 1042 (6th Cir. 1992)). In determining whether government officials are immune from suit, courts utilize a two-part test. See *Brennan v. Township of Northville*, 78 F.3d 1152, 1154 (6th Cir. 1996). First, the plaintiff must allege and demonstrate the deprivation of a constitutionally protected right. *Id.* If successful in meeting that part of the test, the plaintiff must further show that "the right is so 'clearly established' that a 'reasonable official' would understand that what he is doing violates that right." *Id.* (quoting *Anderson v. Creighton,* 483 US. 635, 640 (1987)); see also *Cooper v. Parrish,* 203 F.3d 937, 951 (6th Cir. 2000).

Here, AirTrans alleges that its Fourth Amendment rights were violated by an illegal search and seizure of its property, citing *Truckers United for Safety v. Mead*, 86 F.Supp. 2d 1 (D.D.C. 2000) (*Truckers United I*), and *Truckers United for Safety v. Mead,* 251 F.3d 183 (D.C. Cir. 2001) (*Truckers United II*), to support its contention that the DOT Inspector General was not authorized under §228 of the 1999 Act to obtain and execute a search warrant of the AirTrans offices. In *Truckers United I*, the district court held that the 1999 Act "granted the IG new authority to conduct investigations of motor carriers' fraudulent and criminal activities related to DOT's operations and programs."

---

damages, "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bivens*, 403 U.S. at 396, quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). Thus, the Court, "[h]aving concluded that petitioner's complaint states a cause of action under the Fourth Amendment," held that petitioner was "entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment." *Bivens*, 403 U.S. at 397.

Truckers United II, 251 F.3d at 185. On appeal, however, the D.C. Circuit Court reversed the district court's judgment, noting that the investigation in question occurred before the effective date of the amendment, holding that the Act should not be applied retroactively to that investigation, and declining to deliver an "advisory opinion" on the question of the amendment's effect until timely presented. Given the dates on which the activity in this case was conducted, the question is now ripe for resolution.

The controversy finds its genesis in the original design of the Office of Inspector General, created by Congress in 1978 to provide the various government agencies with "leadership and coordination" by allowing the Inspectors General to "recommend policies for activities designed... to promote economy, efficiency, and effectiveness in the administration of, and... to prevent and detect fraud and abuse in, such programs and operations." 5 U.S.C. App. § 2(2). Because they are appointed by the President and confirmed by the Senate, 5 U.S.C. App. § 3(a), the Inspectors General are clothed with a degree of objectivity and independence meant to enhance their principal roles of curtailing bureaucratic waste and mismanagement and of preventing fraud and abuse within each agency by conducting audits and investigations its programs and operations. *See generally Truckers United II*, 251 F.3d at 185-86. Although supervised by the heads of the various agencies in which they serve, the Inspectors General report directly to Congress and may not be impeded in their work by the heads of their agencies. 5 U.S.C. App. §§ 3(a), 6(a).

Under the Motor Carrier Safety Act of 1984, the Secretary of the DOT has the authority to ensure vehicle safety that includes the power to investigate, to subpoena records and witnesses, and to inspect motor carriers and their documentation. *See* 49 U.S.C. §§ 502(a), 504(c), 506(a).

These activities were delegated to and carried out by the Federal Highway Administration (FHA) until January 1, 2000, when regulation of interstate motor carriers was transferred to the newly created Federal Motor Carrier Safety Administration as part of the 1999 Act. In the same legislation, Congress substantially described the scope of authority of the DOT's Inspector General, as follows:

> (a) In General. – The statutory authority of the Inspector General of the Department of Transportation includes authority to conduct, pursuant to Federal criminal statutes, investigations of allegations that a person or entity has engaged in fraudulent or other criminal activity relating to the programs and operations of the Department or its operating administrations.
>
> (b) Regulated Entities. – The authority to conduct investigations referred to in subsection (a) extends to any person or entity subject to the laws and regulations of the Department or its operating administrations, whether or not they are recipients of funds from the Department or its operating administrations.

106 P.L. 159, 228; 113 Stat. 1748, 1773 (codified at 49 U.S.C. § 354 (2004)).

Although there may have been some dispute between the DOT's OIG and various trucking companies concerning the scope of the Inspector General's investigative authority

prior to the 1999 Act,[4] there can no longer be any question, given the plain language of § 228. The parties agree that Special Agent Zschiesche obtained a warrant by telling a magistrate judge that he was investigating "criminal activity relating to the programs and operations of the Department [of Transportation]." 49 U.S.C. § 354(a). More specifically, Zschiesche claimed that drivers at AirTrans made false statements in an attempt to cover-up violations of federal safety regulations. Coinciding with Zschiesche's claims, the magistrate judge issued a warrant for the seizure of relevant

---

[4]The joint explanatory statement of H.R. 3419: Motor Carrier Safety Improvement Act of 1999 by Rep. Bud Shuster, Rep. James Oberstar, Rep. Thomas Petri, Rep. Nick Rahall, Sen. John McCain and Sen. Ernest Hollings stated:

> This section clarifies Congressional intent with respect to the criminal investigative authority of the Department of Transportation Inspector General (IG). When the Office of Motor Carrier Safety finds evidence of egregious criminal violations of motor carrier safety regulations through their regulatory compliance efforts, it refers these cases to the IG's Office of Investigations. Recently, a U.S. District Court concluded that an investigation undertaken by the IG exceeded its jurisdiction, see In the Matter of the Search of Northland Trucking Inc. (D.C. Arizona) [sic], finding that the motor carrier involved was not a grantee or contractor of the Department, nor was there evidence of collusion with DOT employees. This *narrow construction of the IG's authority is not well grounded in law*, and the managers are concerned about the adverse impacts the Order could have on IG operations. *This provision, therefore, clarifies Congressional intent with respect to the authority of the IG, reaffirming the IG's ability and authority to continue to conduct criminal investigations of parties subject to DOT laws or regulations*, whether or not such parties receive Federal funds from the Department. 145 Cong Rec H 12874 (Nov. 18, 1999) (emphasis added).

documents, including "[d]river qualification files and [ ] personnel files," "driver logs" and "[a]ny and all records relating to ICC or DOT numbers and of applications for such numbers." And, according to the Government, one individual has pleaded guilty to making false statements to the Government on a driver employment application as a result of Zschiesche's investigation. In this way, Zschiesche confined his investigation and search to "criminal activity relating to the programs and operations of the Department [of Transportation]" and complied with § 228 of the 1999 Act.

We hold that the district court was correct in determining that the search warrant secured and executed by Special Agent Zschiesche was validly obtained and that ensuing search did not violate the plaintiff's Fourth Amendment rights in any respect. Having found that there was no constitutional violation, the district court was also correct in granting qualified immunity to the federal defendants and dismissing the complaint as to them, pursuant to Rule 12(b)(6).

CONCLUSION

Because the district court properly dismissed the complaint in this case as to the federal defendants, and because the remaining issues raised on appeal are derivative and therefore rendered moot, we AFFIRM the judgment of the district court as to all defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[DATE STAMP]

AIRTRANS, INC.
Plaintiff,

v. No. 01-2951 Ma

KENNETH MEAD,
Inspector General
U.S. Department of Transportation, et al.
Defendants.

UNITED STATES OF AMERICA.
Intervener.

ORDER GRANTING THE MOTIONS TO DISMISS
OF DEFENDANTS MEAD, ZSCHIESCHE,
AND UNITED STATES OF AMERICA

Before the court are the motions to dismiss of Federal Defendants Kenneth Mead, Joseph Zschiesche, and the United States of America filed on April 19, 2002. Plaintiff filed its opposition to these motions on September 30, 2002. The court GRANTS the motions to dismiss of Mead, Zschiesche, and the United States on the basis of qualified immunity.

I. Background Plaintiff

Airtrans, Inc. ("Airtrans") is a Tennessee corporation with its principal place of business in Dyersburg, Tennessee. (Compl. ¶ 2.) It is in the business of transporting goods by truck in interstate commerce. (*Id.*)

Defendant Kenneth Mead ("Mead") is the Inspector General of the United States Department of Transportation ("USDOT"). (*Id.* ¶ 3.) Defendant Joseph Zschiesche ("Zschiesche") is a Special Agent employed by the Office of the Inspector General ("OIG"). (*Id.* ¶ 4.) Defendant United States of America (the "United States") intervened as a Party Defendant on March 6, 2002. Because their liability turns on common issues of fact and law, the court will refer to Mead, Zschiesche, and the United States collectively as "Federal Defendants."

The following factual allegations are taken as true for the purpose of this order. On or before August 17, 2001, Special Agent Zschiesche, an agent of the Inspector General of the USDOT, obtained a federal search warrant to search Plaintiff Airtrans's premises. (*Id.* ¶ 14.) As a business which transports goods by truck in interstate commerce, Airtrans is subject to regulation by the USDOT. (*Id.* ¶ 2.) The compliance of businesses like Airtrans with USDOT regulations has traditionally been handled by the Office of Motor Carriers of the Federal Highway Administration, not by the office of the Inspector General. (*Id.* ¶ 15.) Neither the Federal Motor Carrier Safety Administration ("FMCSA"), nor any of its agents, directed the OIG to investigate Airtrans. (Id. ¶ 16.)

At about 8:00 a.m. on August 17, 2001, Zschiesche, with assistance from FBI agents and agents of the Dyer County, Tennessee Sheriff's office, executed the federal search warrant on Airtrans's premises. (*Id.* ¶ 24.) No employees of FMCSA were present. (*Id.*) Individual employees of Airtrans were aggressively questioned in isolation. (*Id.* ¶ 25.) During the raid, the executing officials seized records and disabled computers leaving Airtrans unable to effectively function. (*Id.* ¶ 26.) The impact of the continuing investigation has further harmed Airtrans's sales, credit, goodwill, and reputation. (*Id.* ¶ 28.)

II. Standard for Motion to Dismiss

Under Federal Rule of Civil Procedure 12 (b) (6), a defendant may move to dismiss the plaintiff's complaint "for failure to state a claim upon which relief can be granted." When considering a 12 (b) (6) motion to dismiss, a court must treat all of the well-pleaded allegations of the complaint as true, *Saylor v. Parker Seal Co.*, 975 F.2d 252, 254 (6th Cir. 1992), and must construe all of the allegations in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

III. Analysis

Plaintiff alleges that it was the victim of an unconstitutional search based on an illegally obtained search warrant. Specifically, Airtrans contends that Special Agent Zschiesche had no authority to obtain a search warrant to investigate the compliance of a trucking company with federal regulations. (Pl.'s Opp'n to United States' and Federal Defendants' Mot. to Dismiss at 12.) Plaintiff avers that the Inspector General clearly lacks the authority to obtain a search warrant for such purposes because that power would be inconsistent with (i.) the underlying purpose of the OIG, (ii.) the statutory language, and (iii.) the decision of the United States Court of Appeals for the D.C. Circuit in *Truckers United for Safety v. Mead*, 251 F.3d 183 (D.C. Cir. 2001) ("*Truckers United II*") . Because the warrant was illegally obtained, Airtrans argues, its execution violated the Fourth Amendment.

Federal Defendants contend that Zschiesche had the power to obtain the warrant under both Rule 41(a) of the

Federal Rules of Criminal Procedure and the Motor Carriers Safety Improvement Act of 1999, § 228, Pub. L. No. 106-159, 113 Stat, 1748 ("MCSIA"). They further assert that to the extent there is any legal doubt that Zschiesche was empowered to obtain a search warrant, the warrant was still valid because it was obtained with the assistance of Assistant United States Attorney Joe Murphy ("AUSA Murphy"), a person clearly authorized to obtain search warrants. Finally, Federal Defendants maintain, to the extent that Zschiesche may not have been empowered to obtain the warrant, the law was not clearly established. Federal Defendants conclude, therefore, that because there was no violation of clearly established law, they are entitled to qualified immunity.

For Plaintiff to successfully state a claim for violation of its constitutional rights, whether under *Bivens* or § 1983, it "must identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of... law." *Watkins v. City of Southfield*, 221 F.3d 883, 887 (6th Cir. 2000) (citing *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992)). Government officials performing discretionary functions are entitled to qualified immunity from civil suits for damages arising out of the performance of their official duties if they can satisfy a two-part test. See *Cooper v. Parrish*, 203 F.3d 937, 951 (6th Cir. 2000), *cert. denied*, 531 U.S. 877 (2000). A court must first determine whether a plaintiff has alleged a deprivation of a constitutionally-protected right, and if so, then determine whether that right is so clearly established that a reasonable official would understand that what he is doing violates that right. *Id.* A civil rights plaintiff "must show some connection between the defendant's conduct and the alleged constitutional violations." *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987)).

Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v.*

Forsyth, 472 U.S. 511, 526 (1985). The privilege is "an immunity from suit rather than a mere defense to liability," which is "effectively lost if a case is erroneously permitted to go to trial." As a result, the United States Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

"A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier*, 533 U.S. at 201.

The constitutional violation Airtrans has identified is an illegal search and seizure in violation of the Fourth Amendment.[1] (Compl. at 10.) In this respect, Plaintiff's sole challenge to the constitutionality of the search is that the search warrant was obtained ultra vires, because Special Agent Zschiesche did not have the authority to obtain it.[2] The court holds, however, that Special Agent Zschiesche was properly authorized to obtain a search warrant, that he in fact obtained a search warrant, and that the warrant was

---

[1]The Complaint also alleges violations of the Fifth Amendment, but those allegations are likewise premised on the illegality of the search and seizure. Any search or seizure was properly conducted pursuant to a valid federal search warrant. Therefore, Airtrans's failure to state a claim with respect to a Fourth Amendment violation is also fatal to any Fifth Amendment claim it may assert.

[2]Airtrans has no basis to challenge the execution of the search warrant. It covered the entire premises of Airtrans, allowed items to be seized, and was executed at a proper time.

properly executed.[3] Thus, the court finds no constitutional violation. Therefore, Federal Defendants are entitled to qualified immunity.

In determining that Zschiesche, as an agent of the OIG, has the authority to obtain a search warrant to investigate criminal wrongdoing by an entity regulated by the Department of Transportation, the court looks first to the language of the relevant statutes and regulations. While such authority is somewhat inconsistent with the history and purposes of the OIG, the statutory language clearly mandates that it is within the power of a special agent of the Inspector General of the USDOT to obtain and execute a search warrant on regulated motor carriers. Because the impact of the MCSIA on the authority of the OIG is an issue of first impression, the court must explain its analysis in detail.

The court must first consider the extent to which holding that the Inspector General of the USDOT is authorized to obtain and execute a search warrant to conduct a search of an entity regulated by the Department of Transportation would frustrate the letter or purpose of the

---

[3]Federal Defendants argue that the court need not reach this issue because AUSA Murphy was a co-requestor of the warrant. The court disagrees. Airtrans alleges that AUSA Murphy was deceived as to the purpose of the search. Because the court has sealed all documents relating to the issuance of the search warrant, so as not to interfere with an ongoing criminal investigation, Airtrans does not have the information it would require to assess the validity of AUSA Murphy's participation. There is no indication from either party that Special Agent Zschiesche was not the driving force behind the investigation and the sole source of AUSA Murphy's information. Viewing the facts in the light most favorable to the Plaintiff, the court can only presume that any involvement by AUSA Murphy was a formality. This does not indicate that Airtrans is entitled to the sealed documents – it indicates only that the court must look to whether Special Agent Zschiesche had the independent power to request the search warrant.

Inspector General Act. Pub. L. No. 95-452, 92 Stat. 1101 (1978). In multiple respects, such a power contradicts the central mission of the OIG. The OIG was created to police the executive branch departments of the federal government. Congress intended for the Departments to conduct regular operations while the OIG addressed "systemic agency-wide issues." *Truckers United II*, 251 F.3d at 186. To keep the functions of the OIG and the Department of Transportation distinct, the Inspector General Act specifically prohibits the OIG from assuming "program operating responsibilities." *Id.* (quoting 5 U.S.C. app. 3 § 9 (a)(2)).

Under the Motor Carrier Safety Act of 1984, the Secretary of Transportation may issue regulations pertaining to motor vehicle safety. *See* 49 U.S.C. §§ 31133(a), 31136, 31141, 31144, 31502. The Secretary of Transportation also has the authority to enforce those regulations through investigations and compliance reviews. *See id.* §§ 31115, 31133(a), 31142-43, 31503. Pursuant to the MCSIA, passed in 1999, the responsibility for administering the regulations governing interstate motor carriers was transferred to the FMCSA. MCSIA § 113.

Agents of the Inspector General are prohibited from "assuming program operating responsibilities" of the USDOT. Monitoring the compliance of interstate trucking companies is a "program operating responsibility" of the USDOT (specifically of the FMCSA). *Truckers United II*, 251 F.3d at 189. Therefore, viewing that language in isolation, it would appear that Agent Zschiesche obtained the search warrant in violation of The Inspector General Act.

The court, however, cannot view the language of the Inspector General Act in isolation. There are other rules, statutes, and regulations which would expressly grant agents of the Inspector General the power to obtain search warrants and conduct criminal investigations. Furthermore, under the

MCSIA, it is clear that this power extends to the investigation of motor carriers such as Plaintiff Airtrans.

Special Agents of the OIG are clearly authorized to obtain federal search warrants. Rule 41 of the Federal Rules of Criminal Procedure provides: "The phrase 'federal law enforcement officer' is used in this rule to mean any government agent...who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant." Fed. R. Crim. P. 41(h). The Attorney General has provided that "any special agent of the Office of Inspector General, Department of Transportation" is a federal law enforcement officer for the purpose of issuing federal search warrants. 28 C.F.R. § 60.2 (i).

Thus, there is no doubt that Special Agent Zschiesche had the power to obtain a federal search warrant. The only remaining issue is whether the Inspector General Act remains a limitation on this power.

Courts are split on whether or not the Inspector General had such a power prior to the passage of the MCSIA. *Compare Truckers United II*, 251 F.3d at 189 (holding that "The IG... is not authorized to conduct investigations as part of enforcing motor carrier safety regulations – a role which is central to the basic operations of the agency."), *with In re Search of Florillo Corp.*, 33 F. Supp. 2d 799, 805 (S.D. Iowa 1998) (holding that the Inspector General has "the authority to investigate criminal false statements and fraud in connection with a motor carrier's compliance with federal safety regulations."). Neither party has directed the court to any authority that has examined a challenge to the powers of agents of the Inspector General of the USDOT to conduct searches of regulated motor carriers where the search took place after the passage of the MCSIA. Therefore, the court must make an

independent determination regarding the impact of this law on the powers of the OIG.

Congress passed the MCSIA in 1999 "to reduce the number and severity of large-truck involved crashes... through more... inspections and motor carrier compliance reviews [and] stronger enforcement measures against violators." While much of the MCSIA focuses on the creation of the FMCSA, it also provides in pertinent part: "The statutory authority of the Inspector General of the Department of Transportation includes the authority to conduct, pursuant to Federal criminal statutes, investigations of allegations that a person or entity has engaged in fraudulent or other criminal activity..." MCSIA § 228(a). That authority extends to "any person or entity subject to the laws and regulations of the Department [of Transportation]..." *Id.* § 228(b)

Only one court has attempted to construe the effect of Section 228 of the MCSIA on the powers of the Inspector General. *Truckers United for Safety v. Mead*, 86 F. Supp. 2d 1, 18-19 (D.D.C. 2000) ("*Truckers United I*"). In that opinion, the district court held that while the Inspector General did not have the power to obtain and execute federal search warrants to investigate motor carriers prior to passage of the MCSIA, § 228 of that act conferred such authority on the Inspector General. The court held, therefore, that the Inspector General did not act ultra vires by obtaining search warrants in October 1998 because (i) the MCSIA gave it such a power and (ii) the MCSIA could be retroactively applied. *Id.*

The D.C. Circuit Court of Appeals overruled that decision because it held that the district court erroneously applied the MCSIA retroactively. *Truckers United II*, 251 F.3d at 190. The D.C. Circuit then refused to rule on the issue before this court: whether or not the Inspector General

had been given such power by the MCSIA (as the district court had found). *Id.* at 191. The court held that the issue was not yet ripe for review. *Id.* Special Agent Zschiesche's actions, clearly taken after the MCSIA became law, make this issue ripe for review.

This court agrees with the analysis of § 228 of the MCSIA (except for its retroactive application) employed by the United States District Court for the District of Columbia in *Truckers United I*. As that court stated, "It is clear from the language of section 228 that its grant of authority permits the Inspector General to investigate motor carriers for fraud or other criminal activity regardless of whether they receive government funds." *Truckers United I*, 86 F. Supp. 2d at 18. This court recognizes that this grant of power is somewhat inconsistent with the general prohibition on Inspector General participation in the regular operations of the USDOT. However, the unmistakably clear language of section 228 requires that the court resolve the ambiguity to hold that the Inspector General does have the power to obtain search warrants to conduct criminal investigations of motor carriers regulated by the US DOT.[4] As Airtrans is one such carrier, the warrant was not obtained ultra vires.

The court finds, therefore, that Airtrans's constitutional rights have not been violated.[5] All federal

---

[4]The court is aided in this determination by the well-established canon of statutory construction that "specific statutory language should control more general language when there is a conflict between the two." *Nat'l Cable & Telecomms., Inc. v. Gulf Power Co.*, 122 S. Ct. 782, 787 (2002). Here, there is an implied conflict between the two. The specific grant of authority trumps the more general prohibition.

[5]This finding of no constitutional violation is also fatal to Airtrans's return of property claim. To bring a claim for return of property under Federal Rule of Criminal Procedure 41(e), a Plaintiff must be "aggrieved by an unlawful search and seizure" or must be in danger of

officials were merely executing a properly obtained federal search warrant. While the court does not doubt that such an event had a negative impact on Airtrans, the officials acted constitutionally. Thus, the court dismisses all claims against Federal Defendants.[6]

IV. Conclusion

The court hereby GRANTS the motions to dismiss of Defendants Mead, Zschiesche, and United States.

So ORDERED this 29th day of October 2002.

/s/
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

---

suffering irreparable harm. On this record, Plaintiff cannot demonstrate either that the search and seizure were unlawful or that it will suffer irreparable harm.

[6]Because the court holds that there was no constitutional violation, it need not reach the second part of the qualified immunity test, whether the law was clearly established.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

Notice of Distribution

This notice confirms a copy of the document docketed as number 90 in case 2:01-CV-02951 was distributed by fax, mail, or direct printing on October 31,2002 to the parties listed.

Anthony J. McMahon
LAW OFFICE OF ANTHONY J. MCMAHON
6106
MacArthur Blvd.
Ste. 110
Bethesda, MD 20816

James B. Summers
NEELY GREEN FARGARSON BROOKE & SUMMERS
65 Union Ave.
Ste. 900
Memphis, TN 38103

Sidney P. Alexander
U.S. ATTORNEY'S OFFICE
Federal Building
167 N. Main St.
Ste. 800
Memphis, TN 38103

Dean T. Kirby
HOVEY & KIRBY
401 West Broadway
Ste. 1500
San Diego, CA 92101

Edward Medina

HOVEY & KIRBY
401 West Broadway
Ste. 1500
San Diego, CA 92101

Christopher Ashworth
SILICON VALLEY LAW GROUP
152 N. Third Street
Ste. 900
San Jose, CA 95112

Dawn Jordan
ATTORNEY GENERAL'S OFFICE
Civil Litigation and
425 Fifth Avenue North
2nd Floor, Cordell Hull Bldg
Nashville, TN 37243

Honorable Samuel Mays
US DISTRICT COURT

[U.S. DEPARTMENT OF JUSTICE LETTERHEAD]

April 2005

Re: Grand Jury Subpoena

Dear Custodian of Records:

You have been subpoenaed to appear before the federal grand jury to produce certain documents on _____.

While you are not required to do so, for your convenience you may, prior to the appearance date, turn the subpoenaed documents over to _____ Special Agent with the U.S. Department of Transportation, Office of Inspector General – Investigations, S/A _____ may be reached at 201 Mission Street, Suite 2310, San Francisco, CA 94105. The grand jury will be notified that these documents have been produced pursuant to a grand jury subpoena. If you elect to do this, you need not appear personally at the appointed time. Questions concerning the subpoena should be directed to the aforementioned agent at _____ or the undersigned Assistant United States Attorney.

This subpoena has been issued pursuant to a criminal investigation being conducted by the federal grand jury. Although you are not prohibited from doing so, it is requested that your company not disclose the fact of the subpoena or your production of the information described in the subpoena to your customer or any other individual. Any such disclosure could impede the investigation being conducted and thereby interfere with the enforcement of the law.

Your cooperation and courtesy are appreciated.

Sincerely yours,

Enclosure(s)

A-29

UNITED STATES DISTRIC COURT
FOR THE DISTRICT OF _____

TO:

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

SUBPOENA FOR:

☐ PERSON ☒ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE

COURTROOM
Grand Jury Room

DATE AND TIME
May 24, 2005
8:30 A.M.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):[1]

PLEASE SEE ATTACHMENT

☐ *Please see additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

---

[1]If not applicable, enter "none"

CLERK

DATE
April 25, 2005

(BY) DEPUTY CLERK
/s/

This subpoena is issued on application
of the United States of America

_____, U.S. ATTORNEY
Financial Privacy Restrictions Apply
Yes ___ No _X_
6(c) filed _____

NAME, ADDRESS AND PHONE NUMBER OF
ASSISTANT U.S. ATTORNEY

ATTACHMENT

You are requested to produce the following information, whether recorded in hard-copy form or stored electronically on computers or other electronic media, for the period beginning August 1, 2004, and continuing through April 1, 2005, inclusive, relating to any and all _____ drivers, whether employed, leased, used by or controlled by _____ who drove routes in which they picked up freight at_____.

1) The name of each driver employed, leased, used by or controlled by _____ and their identification and qualification information.

2) The name of each driver manager and dispatcher working with the above described drivers.

3) The driver records and duty status documents, including but not limited to driver daily log book, trip reports and/or envelopes, invoices, fuel receipts, toll receipts, meal receipts, motel receipts, weight and scale tickets, border crossing reports, U.S. Customs declarations, delivery receipts, roadside inspection reports, truck wash receipts, expense vouchers, summonses and traffic citations, driver phone in records, telephone records, waybills, cash advances, driver credit cards or phone call cards, credit card receipts, including date of issue, driver names and addresses having access to such cards, all billing usage information relating to such cards, global positioning reports, QUALCOM data, port of entry receipts and records, fuel purchase reports, mileage reports, pick up and delivery reports, on-board computer reports, all other reports based on information supplied by or pertaining to drivers,

dispatch records including trip book, dispatch instructions, and time cards.

4) Payroll records including the _____ drivers payroll recap reprint, earning statement, payroll sheets, checks, check ledgers, direct deposit, work sheets showing how drivers are paid and how pay is calculated, all tax returns, forms or work sheets relating in any way to the payment of drivers, including but not limited to IRS forms 940, 941, and 1099.

5) All shipping documents and trip envelops including bills of lading, manifests, freight bills, memorandum of shipments, repair bills, gate receipts, over/short and damage reports, and all other shipping related documents.

6) All accident and insurance information, including state and federal worker's compensation applications, overweight/oversize reports and citations, trip permits, all damage appraisals or estimates, state or federal accident/incident reports, insurance company information including accident reports, loss run reports, reports of money paid, accident history, money reserved, and insurance policy information.

Supreme Court, U.S.
FILED
AUG 18 2005
OFFICE OF THE CLERK

(2)

No. 05-10

In The
Supreme Court of the United States

AIRTRANS, INC.,

Petitioner,

vs.

KENNETH M. MEAD, The Inspector General, United States Department of Transportation, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DEAN T. KIRBY, JR.
Counsel of Record
EDWARD MEDINA
KIRBY & MCGUINN, A.P.C.
600 B Street, Suite 1950
San Diego, CA 92101
(619) 685-4000

Attorneys for Respondent Samsung International, Inc.

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. INTRODUCTION AND STATEMENT OF THE CASE

This is an action by plaintiff/petitioner AirTrans, Inc., a Tennessee corporation ("Airtrans") filed against various governmental and law enforcement officials, and three private defendants, Christopher Ashworth ("Ashworth"), a California attorney, and his clients U.S. Logistics, Inc., a Nevada corporation and Samsung International, Inc., a New Jersey corporation ("Samsung"), seeking damages and injunctive relief relating to an alleged illegal search of Airtrans' business premises in Dyersburg, Tennessee.

The Amended Complaint alleges that the search of Airtrans business premises was conducted pursuant to a search warrant issued to Joseph M. Zschiesche, an agent of the Inspector General of the Department of Transportation.

The Amended Complaint makes no allegation that Samsung participated in the search. The gravamen of the Amended Complaint against Samsung is that the communication by their attorney, Ashworth, to law enforcement officials resulted in an unlawful and improperly conducted search which damaged Airtrans. The Amended Complaint is unclear as to what claims for relief are being asserted against Samsung based on the few facts alleged against them. The only clue is in a preliminary allegation which states "[t]he Court has pendent jurisdiction over claims for libel, slander and tortious interference with the business of Plaintiff."

On May 20, 2002, Samsung filed a motion to dismiss the Amended Complaint because they may not, under any possible legal theory, be liable in damages for statements made by their lawyer to law enforcement officials. Such

statements are absolutely privileged under both the California "official proceeding" and "litigation" privilege, and do not give rise to a claim for relief based either upon defamation or interference with contractual relations. Airtrans never disputed that California law applies to the conduct alleged in the Amended Complaint. Samsung's motion also denied liability, because as a matter of law, Samsung may not be vicariously liable for the alleged torts of their attorney.

The District Court's carefully reasoned opinion dismisses all claims against Samsung. The Court ruled that Ashworth's allegedly false statements to authorities are absolutely privileged under California law and cannot serve as a basis of liability.

The Sixth Circuit affirmed the judgment of the district court dismissing the complaint as to all defendants. Airtrans now seeks a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Sixth Circuit regarding the following question: whether the Inspector General of the United States Department of Transportation has authority to obtain and execute a search warrant to investigate compliance with regulations of the Federal Motor Carrier Safety Administration.

II. THE INDIVIDUAL DEFENDANTS SHOULD NOT BE CONSIDERED BY THIS COURT

Generally, only the question set out in the petition, or fairly included therein, will be considered by the Court. Sup. Ct. R. 14.1(a). Furthermore, an issue which is nowhere mentioned in the petition for certiorari is not before the Supreme Court for consideration. *Namet v. U.S.*, 373 U.S. 179, 190, 83 S.Ct. 1151 (1963).

The question presented by Airtrans is whether the Inspector General of the United States Department of Transportation has authority to obtain and execute a search warrant to investigate compliance with regulations of the Federal Motor Carrier Safety Administration, an operational administration within the Department of Transportation. There is no mention in the petition of Samsung or of any of the private defendants. The underlying allegations asserted against Samsung do not fall within the question presented by Airtrans. Other than being listed as a party to the proceeding, Samsung, and the actions against Samsung have not been brought before this Court.

Airtrans cites conflict among the Circuits concerning the investigatory power conferred by the Inspector General Act, and the fact that the allegedly Ultra Vires investigations are continuing as the main reasons for issuing a writ of certiorari. These issues and potential conflicts of law do not reasonably fall within the scope of any theory or statutory basis for liability against Samsung. Nor would a reversal of whether the Inspector General's investigation was lawful implicate Samsung. Samsung therefore, respectfully requests that if Airtrans' Petition is granted, that it be granted only as to the question presented, and as to the Respondents implicated by the question presented.

III. CONCLUSION

The question presented by Airtrans for consideration is outside the scope or involvement of respondent Samsung. Whether or not the Inspector General had authority to investigate or obtain a warrant, Samsung is protected by the "official proceeding" and the "judicial proceeding" privileges provided by California Civil Code section 47. Furthermore, Airtrans has failed to present any issues regarding Samsung or any of the private respondents, and therefore, the issues are not properly before this Court. Therefore, Samsung respectfully requests that if Airtrans' Petition for a Writ of Certiorari is granted, that it be granted solely as to the issue involving the question presented, and as to the governmental agencies implicated by the question.

Respectfully submitted,

DEAN T. KIRBY, JR.
EDWARD MEDINA
600 B Street, Suite 1950
San Diego, California 92101
(619) 685-4000

Attorneys for Respondent Samsung International, Inc.